Supreme Court No. 84855-6

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF WASHINGTON

IN

CHAD M. CARLSEN and SHASTA CARLSEN;
husband and wife, individually and on behalf of
a Class of similarly situated Washington families; and
CARL POPHAM and MARY POPHAM,
husband and wife, individually and on behalf of
a Class of similarly situated Washington families,

Plaintiffs,

vs.

GLOBAL CLIENT SOLUTIONS, LLC, an Oklahoma limited liability company; ROCKY MOUNTAIN BANK & TRUST, a Colorado financial institution; et al.,

Defendants.

PLAINTIFFS' REPLY BRIEF

DARRELL W. SCOTT
MATTHEW J. ZUCHETTO
Attorneys for Plaintiffs

THE SCOTT LAW GROUP, P.S.
926 W. Sprague Ave., Suite 680
Spokane, WA 99201
(509) 455-3966

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I. A For-Profit Company is Engaged in "Debt Adjusting" as defined in RCW 18.28.010(1) when, in Collaboration with Debt Settlement Companies, it Maintains a Custodial Bank Account in its Own Name for Purposes of Accumulating and Holding Debtors' Funds; and it Serves as a Custodian for Debtors For Purposes of Distributing those Funds among Creditors Pursuant to Settlements Achieved by Debt Settlement Companies.

A. Defendants Disregard the Salient Factual Premises Contained in the First Question Posed by the Federal District Court.

The Federal District Court's certification of questions to this Court resulted from Defendants' motion to dismiss Plaintiffs' Class Complaint in its entirety based on FED. R. CIV. P. 12(b)(6). The questions of law posed by the Federal District Court, as a consequence, are not predicated on factual finding, nor do the questions improperly invite the Washington Supreme Court to engage in a fact-finding mission. The unresolved questions of local law, rather, are framed by key relevant factual premises underlying Plaintiffs' legal claims. The first certified question, in this regard, asks:

> Is a for-profit business engaged in "debt adjusting" as defined in RCW 18.28.010(1) when, in collaboration with debt settlement companies, it: a) establishes and maintains a custodial bank account in its name; b) solicits debtors' establishment of a sub-account to receive and hold periodic payments to be used to pay debt settlement fees and pay settlements with creditors as negotiated by a debt settlement company; and c) as a custodian for the debtor, receives and holds the debtor's periodic payments in a sub-account, paying from that account debt settlement fees and negotiated settlements with creditors?

The Federal District Court crafted this question following court-ordered discovery regarding "the precise nature of GCS and RMBT, and what they do in conjunction with each other, and in conjunction with debt settlement companies" and after subsequent briefing regarding the results of that discovery. **Ct. Rec. 40** *(Order Denying Motions, p. 8)*; Plaintiffs' Opening Brief, p. 4.

The factual premises underlying the Federal District Court's desire to obtain guidance from the Washington Supreme Court may be also observed in the Order of Certification:

> Global Client Solutions, LLC (GCS) is in the business of receiving funds for the purpose of distributing those funds among creditors in payment or partial payment of obligations of debtors, including the Plaintiffs. GCS, in partnership with Rocky Mountain Bank and Trust (RMBT), maintains and manages debt settlement accounts that are part of debt settlement programs offered by companies such as Freedom Debt Relief, LLC, and Silver Bay Financial, Inc. As part of their debt settlement programs, Plaintiff established debt settlement accounts maintained and managed by GCS, in partnership with RMBT.

Ct Rec. 84 *(Certification to Washington State Supreme Court, p. 2).* Defendants, unfortunately, ignore the question's salient premises in their Answering Brief and improperly and unnecessarily attempt to engage the Washington Supreme Court in fact-finding.

Having challenged the legal sufficiency of allegations advanced in Plaintiffs' Complaint under FED. R. CIV. P. 12(b)(6), Defendants now evade those allegations and instead advance (and ask this Court to embrace) Defendants' own preferred facts. GCS simply declares as fact that it is a mere agent of RMBT performing "back-office" banking activities for RMBT in respect of ordinary bank accounts opened by consumer debtors. Defendants' Answering Brief, p. 32. GCS's self-portrayal is not germane to either the first certified question of law posed by the Federal District Court or to Defendants' underlying motion to dismiss Plaintiffs' Complaint as a matter of law.

Fact-finding is not the proper aim of an appellate court—particularly when it is addressing unresolved questions of local law under certification by a federal court. Washington's Federal Court Local Law Certification Procedures Act, chapter 2.60 RCW, permits a federal court to certify a question of local law to the Washington Supreme Court "[w]hen in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined . . ." RCW 2.60.020. The Certificate procedure is based on the record, RCW 2.60.030(2). The record on such certification consists of "[a] stipulation of facts approved by the federal court showing the nature of the case and

the circumstances out of which the question of law arises or such part of the pleadings, proceedings and testimony in the cause pending before the federal court as in its opinion is necessary to enable the supreme court to answer the question submitted . . ." RCW 2.60.010(4). "Where an issue is not within the certified questions, [but] within the province of the federal court, this court will not reach the issue. The federal court retains jurisdiction over all matters except the local question certified." *Broad v. Mannesmann,* 141 Wn.2d 670, 676, 10 P.3d 371 (2000) (internal citation omitted). *See, e.g., Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 205, 193 P.3d 128 (2008); *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 809 P.2d 782 (1985). This Court, therefore, should decline Defendants' improper invitation to engage in fact-finding, a matter within the province of the federal court and one not material to the question of law as posed.

B. Defendants Recite, But Then Disregard, the Rules of Statutory Interpretation That Resolve the Question Posed.

Defendants concede that the questions posed by the Federal Court are questions of law whose answers involve matters of statutory interpretation. *See, e.g.*, Defendants' Answering Brief, at p. 14 ("The rules of statutory interpretation apply."). Defendants further concede that answers to questions posed involve ascertaining the legislature's intent,

and that where the statute's plain meaning may be derived from the wording of the statute, in context with other provisions of the statute and of related statutes, the Court's mission is complete. Appeals to statutory construction aids, including legislative history, thus, are both unnecessary and improper. *See* Defendants' Answering Brief, pp. 14-15. The Defendants, unfortunately, do not enlist the principles of statutory interpretation that they acknowledge are controlling.

The central thesis of Plaintiffs' Opening Brief is that RCW 18.28.010(1) is unambiguously disjunctive, such that receiving funds for the purpose of distributing those funds among creditors constitutes "debt adjusting." Plaintiffs demonstrated that this plain-meaning interpretation of RCW 18.28.010(1) is consistent with the remedial purpose of the statute that, *inter alia*, regulates trust accounts into which debtors' payments are placed. *See* RCW 18.28.150.

Defendants, however, neither address the question as certified nor attempt demonstration that the language of RCW 18.28.010(1) is ambiguous. They similarly fail to otherwise controvert the "plain-meaning" interpretation of RCW 18.28.010(1) advanced by Plaintiffs. Defendants, thus, fall short in their burden of rejoinder.

C. "Holding Oneself Out" is Not a Requisite of "Debt Adjusting."

Rather than address the question posed by the Federal District Court directed at RCW 18.28.010(1), Defendants deflect their attention to RCW 18.28.010(2), misread that provision, and then erroneously conclude that they are not "debt adjusters" within the meaning of RCW 18.28.010(2). Specifically, Defendants make the factual assertion that "RMBT and GCS are not holding themselves out as engaged in the business of debt adjusting for compensation" and "are only providing banking services." *See* Defendants' Answering Brief, p. 16. From these factual premises they conclude that they are not "debt adjusters" under RCW 18.28.010(2).

RCW 18.28.010(2) reads "any person engaging in **or** holding himself or herself out as engaging in the business of debt adjusting for compensation" is a "debt adjuster." (Emphasis added). "Holding oneself out" is not a requisite to one's coming within the purview of the Act. Defendants, moreover, presuppose factual findings that have not been made, and that are counter-factual to express allegations advanced in the Complaint. *See* Amended Complaint, ¶ 74 ("GCS, in its own capacity, holds itself out as engaged in the business of managing, counseling,

settling, adjusting, and/or liquidating the indebtedness of debtors."). **Ct. Rec. 83** *(Amended Class Action Complaint).*

D. Recent FTC Amendments to the Telemarketing Sales Rule are Immaterial to the Interpretation of RCW 18.28.010(1).

The Federal Trade Commission recently amended its Telemarketing Sales Rules so as to regulate certain activities in the debt relief industry. Among other things, those rules prohibit altogether the charging of any debt settlement fees prior to consummation of settlement. The fee prohibitions are applicable to "Debt Relief Service[s]," a regulatory term defined in the new rules. *See* 16 CFR § 310.2. Parties who serve as custodians of debt settlement funds pending such settlements, such as GCS, significantly, are also subject to potential liability. *See* 16 CFR § 310.3(b).

GCS correctly observes that it is not a "Debt Relief Service" within the meaning of the new regulations. This point however, is immaterial to the question of statutory interpretation posed by the Federal District Court, which concerns the term "debt adjusting" as defined at RCW 18.28.010(1). GCS also notes that the new federal Telemarketing Sales Rules do not categorically prohibit employment of third-party debt settlement trusts, such as GCS' "special purpose account." *See* 16 CFR § 310.4(a)(5)(ii) ("Nothing in § 310.4(a)(5)(i) prohibits requesting or

requiring the customer to place funds in an account to be used for the debt relief provider's fees and for payments to creditors. . ."). At the same time, the commission made abundantly clear that these entities will be closely watched. *See TSR Final Rule Amendments*, 75 Fed. Reg. 48,458, 48,491 (Aug. 10, 2010) ("The Rule does not prohibit an independent entity that holds or administers a dedicated bank account meeting the . . . criteria from charging the consumer directly for the account. However, the Commission will be monitoring practices related to these fees, and it may take further action, if needed to address any deceptive or abusive fee practices in connection with the accounts.").

The fact that the FTC does not prohibit special purpose accounts, however, is of no consequence to either the certified question posed or to Plaintiffs' underlying claims. Plaintiffs' Complaint does not challenge the practice of employing third-party trusts to hold debt settlement funds. To the contrary, RCW 18.28.150 requires the establishment of trust accounts where the debt adjusting program involves the receipt of debtors' funds. Plaintiffs challenge, rather, whether GCS's special purpose accounts are established and managed in compliance with chapter 18.28 RCW. No question certified by the Federal District Court, it should also be observed, places at issue the legality of custodial accounts to hold settlement funds.

E. Whether FTC Amendments to Telemarketing Sales Rules Preempt Provisions of Washington's Debt Adjusting Statute is Not at Issue.

Defendants claim that the Telemarketing Sales Rule preempts Washington's Debt Adjusting statute because the former's definition of "Debt Relief Service" differs from the latter's definition of "Debt Adjusting." This conclusion lacks merit, however, because the Telemarketing Sales Rules do not displace or preempt state debt adjusting statutes, such as chapter 18.28 RCW, where enforcement of the state statutory requirements do not directly conflict with the Telemarketing Sales Rules. *TSR Final Rule Amendments*, 75 Fed. Reg. 48,458, 48,522-23 (Aug. 10, 2010) (to be codified at 16 C.F.R. pt. 310); 16 CFR § 310.7(b). Defendants' observation that two different regulatory terms contained in two different regulations are not identical does not demonstrate that enforcement of Washington's Debt Adjusting statute is in direct conflict with the Telemarketing Sales Rules, nor demonstrate that the difference somehow bears on the correct statutory interpretation of RCW 18.28.010(1). The overarching "aim of statutory interpretation is 'to discern and implement the intent of the legislature.'" *Sheehan v. Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). Discussion as to whether federal Telemarketing Sales Rules preempt Washington's Debt Adjusting statute

does nothing to contribute to the discernment of Washington's statute's meaning.

Moreover, there simply is no material conflict. Conflict preemption occurs "when compliance with both state and federal law is impossible or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California v. ARC Am. Corp.*, 490 U.S. 93, 100-01 (1989) (citation omitted). Defendants do not attempt explanation as to how compliance with both Washington's Debt Adjusting statute and the Telemarketing Sales Rules is rendered impossible.

Moreover, federal preemption is not a matter properly addressed by this Court. *See Broad v. Mannesmann*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000) (citing *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 577, 964 P.2d 1173 (1998)) ("the court lacks jurisdiction to go beyond the question certified" and the court therefore only addressed those arguments necessary to answer the certified questions.) Issues of federal preemption are matters comfortably within the province and experience of a federal district court. This Court, therefore, should leave these issues to the federal district court. *See Broad*, 141 Wn.2d. at 676.

II. The "Banking" Exclusion Found at RCW 18.28.010(2)(b) Excludes Financial Institutions Licensed and Regulated Under Applicable Bodies of State or Federal Law; the "Banking" Exclusion Does Not Extend to Non-Financial Institutions.

The second question of unresolved local law posed by the Federal District Court concerns the "Banking" exclusion found at RCW 18.28.010(2)(b). Washington's Debt Adjusting statute is remedial in nature. The "banking" exclusion found at RCW 18.28.010(2)(b), therefore, should be narrowly construed. *See Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 882, 154 P.3d 891 (2007) (citing *Drinkwitz v. Alliant Techsys., Inc.*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000)).

The question of law posed by the Federal District Court in its second question incorporates the factual predicates set forth in its first question. The second question posed, therefore, is whether the "banking" exclusions applies where:

- A for-profit company is acting as a **custodian for the debtor**;
- It has established **its own custodial bank account;**
- In **collaboration with debt settlement companies** it **receives and holds** debtors' periodic debt settlement payments in designated subaccounts of **its own custodial bank account**; and

- It pays from those subaccounts debt settlement **fees** and **negotiated settlements** with creditors.

GCS, however, both evades the question posed and attempts to reengineer it to reflect factual assertions favorable to GCS that are presently at issue in the underlying litigation. GCS, thus, recasts the question as whether the "banking" exclusion applied where:

- A **debtor** establishes **an individual bank account** at a **financial institution**;

- The **financial institution retains GCS** to perform **"back office"** clerical work for the bank in the administration of **customer's bank account**; and

- The **banking customer** can close his **individual bank account** at any time **without penalty**. *See* Defendants' Answering Brief, pp. 6, 32; **Ct. Rec. 58-11** at ¶¶ 11, 28-29, 32 & 33.

GCS, thus, ignores the salient premises of the question certified by the Federal District Court. In so doing, GCS also disregards the procedural posture of this case: the certification of unresolved questions of local law resulting from Defendants' 12(b)(6) challenge to the legal sufficiency of Plaintiffs' Complaint. GCS thus improperly seeks to engage this Court in an adjudication of disputed questions of fact.

Ironically, in so doing, GCS essentially concedes the insufficiency of its underlying and pending 12(b)(6) motion to dismiss.

GCS also attempts an erroneous and expansive misreading of the "bank" exclusion as extending to any businesses "doing business relating to banks." *See* Defendants' Answering Brief, p. 2 ("Carlsen and Popham make these allegations in the face of an express statutory exemption for banks and others engaged in business related to banks . . ."). The referent in the "doing business under" clause of RCW 18.28.010(2)(b), however, is "law," not "banks." See RCW 18.28.010(2)(b) ("**[D]oing business under** and as permitted by **any law of this state** or of the United States relating to banks.") (emphasis added).

GCS, finally, factually asserts that "RMBT and GCS are 'subject to the oversight and examination authority of the Federal Deposit Insurance Corporation and other bank regulatory authorities.'" *See* Defendants' Answering Brief, p. 5. The record GCS cites to supporting this representation does not support this factual claim. *See* **Ct. Rec. 58-11** at ¶ 2. In all event, this claim is an unresolved question of fact not presently before this Court.

III. Defendants Fail to Address the Issue Posed by the District Court in its Third Certified Question.

Defendants' Answering Brief mis-analyzes the third certified question as asking whether the fee limitations of RCW 18.28.080 apply to Defendants themselves, rather than whether the limitations are applicable to the debt settlement companies with whom GCS collaborates. Defendants, thus, advance the misguided arguments that RMBT charges no fees, that GCS' fees are "nominal," that GCS and RMBT are not engaged in negotiating settlements, and that the limitations only apply where the fees are set forth in contracts.

The District Court certified the following question:

> Do the fee limitations set forth in RCW 18.28.080 apply to for-profit **debt settlement companies** engaged in soliciting the participation of debtors in a **debt management program** involving: (a) monthly set aside and accumulation of a debtor's funds in a custodial account for the purposes of facilitating negotiated settlement of specified credit card debts; and (b) **negotiations by the debt settlement company**, on behalf of the debtor, to secure compromise settlement of the debtor's credit card debt, to be paid from the custodial account?

Ct Rec. 84 (*Certification to Washington State Supreme Court, p. 3*) (emphasis added). This question is plainly directed at determining the applicability RCW 18.28.080 to "debt settlement companies" (such as those with whom GCS collaborates). The Federal District Court did not

pose the quite different factual question: whether Defendants are charging fees that violate the act.

The question posed by the Federal District Court is an important one. The applicability of Washington's Debt Adjusting statute to modern-day debt settlement companies (who typically employ third parties to hold debtors' settlement funds) is central to the vitality and enforcement of Washington's Debt Adjusting statute. It is also a core issue underlying the claims advanced in the Class Complaint.

As detailed in Plaintiffs' Opening Brief, answering the question posed involves determination as to whether activities detailed in the question constitute "managing, counseling, settling, adjusting, prorating, or liquidating" of the debtor's debt, within the meaning of RCW 18.28.010(1), and if so, whether such activities constitute "debt adjusting" without regard for whether the actor is also directly engaged in "receiving funds for the purpose of distributing said funds among creditors" once settlements are achieved.

As fully detailed in Plaintiffs' Opening Brief, negotiations by the debt settlement company, on behalf of a debtor, to secure compromise settlement of a debtor's credit card debt constitutes "settling," within the meaning of RCW 18.28.010 (if not also "managing," "counseling," "adjusting" and "liquidating" such debt). Further, owing to the disjunctive

nature of RCW 18.28.010(1), such a company is engaged in "debt adjusting" within the meaning of RCW 18.28.010(1) without regard for whether it also receives the funds ultimately distributed to creditors.

Finally, the fee limitations of RCW 18.28.080 apply to "debt adjusters." That term is statutorily defined as a for-profit company that engages in "debt adjusting." RCW 18.28.010(2). Debt settlement companies that engage in the activities set forth in the third certified question, therefore, are plainly subject to the fee limitation of RCW 18.28.080.

Washington's proscription against predatory debt adjusting fees is not, as Defendants state, confined to those who "contract" for such illegal fees (a point of little consequence since debt settlement companies' illegal fees are invariably set forth in debt management contracts). In this regard, RCW 18.28.090 provides that when a debt adjuster "contracts for, **receives, or makes** any change in excess of the maximum" provided for under the statute, the debt adjuster's contract with the debtor is void and fees must be disgorged. RCW 18.28.090 (emphasis added).

IV. Washington Law Recognizes Aiding and Abetting as a Claim for Secondary Liability.

A. Aiding and Abetting is a Common Law Secondary Liability Doctrine; Not a Cause of Action Implied From a Statute.

While the endpoints of Plaintiffs' and Defendants' answers to the fourth question are both "No," the legal import of their answers are at significant and important odds owing to conflicting concepts as to what "aiding and abetting" is.

Defendants wrongly presuppose that Plaintiffs' civil claim for aiding and abetting is nothing, unless an implied cause of action arising from RCW 18.28.190, which criminalizes violation of the Debt Adjusting statute as well as aiding and abetting violation of the Act.

Plaintiffs' Opening Brief, however, details Washington's recognition of the common law principle of secondary liability as to one who knowingly and substantially assists another in the commission of a tort, as generally reflected in Section 876(b) of the RESTATEMENT (SECOND) OF TORTS. *See* Plaintiffs' Opening Brief, pp. 24-32. Aiding and abetting is thus a liability claim against another arising from and secondary to a cause of action perpetrated by an original tortfeasor. It is liability rooted in Washington common law, not a statutorily-created cause of action. Washington's common law recognition of secondary civil liability of one who knowingly and substantially assists another in the commission of tortuous conduct predates, and therefore provides legislative context to, both Washington's Consumer Protection Act and Debt Adjusting statute. Nothing in either statute suggests that the

legislature intended to suspend the common law doctrine regarding secondary liability.

B. The Elements of an Implied Right of Action are Found with Respect to RCW 18.28.190.

Defendants now acknowledge this common law authority and wrongly accuse Plaintiffs of having changed their position. True to their own concept of aiding and abetting, they also challenge whether RCW 18.28.190 itself gives rise to an independent "implied cause of action" as against one who aids and abets.

Although Plaintiffs believe the proper legal analysis regarding aiding and abetting liability is rooted in common law—not efforts to find an implied right of action in a statute—the elements for such an implied right of action may be found with respect to RCW 18.28.190.

A cause of action may be implied from a statute if: (1) the plaintiff is within the class of persons for whose especial benefit the statute was enacted; (2) the legislative intent, explicitly or implicitly, supports the creation of a remedy; and (3) implying a remedy is consistent with the underlying purpose of the statute. *Winget v. Yellow Freight Systems*, 146 Wn.2d 841, 850, 50 P.3d 256 (2002).

Approaching aiding and abetting as a "cause of action," those elements are satisfied here. Named Plaintiffs' status as debtors who

engaged debt adjusters in an effort to secure settlement of their debts makes them persons for whom chapter 18.28 RCW was promulgated. The legislature's explicit intent to provide for civil remedies flowing from violation of chapter 18.28 RCW is found at RCW 18.28.185, which declares violation of that chapter an unfair or deceptive act or practice under chapter 19.86 RCW. Further, an implied remedy as against one who aids and abets violation of chapter 18.28 RCW is fully consistent with the underlying purpose of the statute. The statute, among other things, is aimed at protecting Washington consumers from predatory debt adjuster fees and at deterring those who would aid and abet such violations of the Act. It is consistent with the underlying purpose of that Act to permit victims of such violations to hold those who aided or abetted violation of the Act secondarily liable for injury they suffered. *See Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 49, 204 P.3d 885 (2009) ("By broadly prohibiting 'unfair or deceptive acts or practices in the conduct of any trade or commerce,' RCW 19.86.020, the legislature intended to provide sufficient flexibility to reach unfair or deceptive conduct that inventively evades regulation.") (emphasis added).

Citing *Cazzanigi v. GE Credit Corporation*, 132 Wn.2d 433, 938 P.2d 819 (1997), Defendants assert that RCW 18.28.185 provides an adequate remedy and, thus, no cause of action should be implied from

RCW 18.28.190. In this regard, RCW 18.28.185 states: "A violation of this chapter constitutes an unfair or deceptive act or practice in the conduct of trade of commerce under chapter 19.86 RCW." One who aids and abets, for example, the securing of predatory fees, however, has violated the chapter, namely RCW 18.28.190. The business of aiding and abetting, therefore, **is itself** an unfair business practice by operation of RCW 18.28.185. The civil remedy provided at RCW 18.28.185 is the vehicle through which civil aiding and abetting liability may be redressed.

The Telemarketing Sales Rules governing companies engaged in "Debt Relief Services," it may be noted, reflect the same public policy concerns warranting imposition of aiding and abetting liability on those who assist debt relief companies in violating the law. In that regard, the Telemarketing Sales Rules make "assisting and facilitating" a violation of the rules itself a violation. 16 CFR § 310.3(b), captioned "Assisting and facilitating" provides: "It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule." *Id.* The FTC thus essentially codified "aiding and abetting"

liability as to those who substantially assist "Debt Relief Service" companies in violating the act by, for example, securing illegal fees.

Federal law, in contrast with state law, does not have the benefit of the body of common law that embraces secondary liability, thereby necessitating the codification of such aiding and abetting liability in the rules themselves. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) ("[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations, and admiralty cases."). The FTC's codification of aiding and abetting liability therefore supports a holding in the present case that Washington State embraces common law aiding and abetting liability in this context. As stated in RCW 19.86.920, the purpose of Washington's Consumer Protection Act is as follows:

> The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar

> matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

C. Federal Securities Law Sheds No Light on State Common Law Principles of Aiding and Abetting.

Finally, Defendants turn their sights to aiding and abetting in the context of federal securities law. As the *El Camino* court observed in its recent and plenary analysis of the common law doctrine of aiding and abetting, as reflected in the Restatement:

> [Plaintiffs] have suggested that the court ignore securities law cases. Yet, in this instance, they rely on a securities-law concept that appears to lower their burden drastically. . . . Plaintiffs had it right the first time. The federal cases decided under section 10(b) of the Securities Exchange Act do involve issues of federal policy, statutory interpretation, and legislative history, all of which make them problematic as precedent for state tort law, which is based on much different policy considerations.

El Camino Resources, LTD v. Huntington National Bank, 2009 U.S. Dist. LEXIS 128084 at *81-82 (W.D. Mich. 2009). The *El Camino* Court was correct.

The seminal case in this highly nuanced arena of federal securities law is *Central Bank, N.A. v. First Interstate Bank*, 511 U.S. 164 (1993). There, the Court's plurality decision—a drastic deviation from well established legal traditions—was guided specifically by the text of Section

10(b) of the 1934 Securities Exchange Act itself. Since "the language of Section 10(b) does not in terms mention aiding and abetting," there could be no implied cause of action for aiding and abetting. *Central Bank*, 511 U.S. at 188. Subsequent courts, such as the *El Camino* court, have narrowly construed *Central Bank* and its progeny, stringently limiting its holding to its original context—the federal securities arena. *See Boim v. Quranic Literacy Inst.*, 29 F.3d 1000, 1019-20 (7th Cir. 2002); *see also* Richard H. Walker and David M. Levine, *The Limits of Central Bank's Textualist Approach—Attempts to Overdraw the Bank Prove Unsuccessful*, 26 HOFSTRA L. REV. 1 (1997). This Court should do the same.

V. CONCLUSION

For the above reasons, Plaintiffs respectfully request that this Court answer the questions posed by the District Court in the manner set forth in Plaintiffs' Opening Brief.

Respectfully Submitted this 12th day of October, 2010.

DARRELL W. SCOTT
MATTHEW J. ZUCHETTO
The Scott Law Group, P.S.
926 W. Sprague Ave., Suite 680
Spokane, WA 99201
(509) 455-3966
Counsel for Plaintiffs

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 12th day of October, 2010, I caused this Reply Brief to be filed with the Supreme Court of the State of Washington and the same to be served, via U.S. Mail, to the following:

Sally Gustafson Garratt
Freimund Jackson Tardif & Benedict Garratt, PLLC
711 Capitol Way S., Suite 605
Olympia, WA 98501

Gregory E. Jackson
Freimund Jackson Tardif & Benedict Garratt, PLLC
711 Capitol Way S., Suite 605
Olympia, WA 98501

Richard W. Epstein
Greenspoon Marder PA
Trade Centre South, Suite 700
100 W. Cypress Creek Road
Fort Lauderdale, FL 33309

Haas A. Hatic
Greenspoon Marder PA
Trade Centre South, Suite 700
100 W. Cypress Creek Road
Fort Lauderdale, FL 33309

Rebecca F. Bratter
Greenspoon Marder PA
Trade Centre South, Suite 700
100 W. Cypress Creek Road
Fort Lauderdale, FL 33309

/s/ Darrell W. Scott
Counsel for Plaintiffs